NEWSLETTER OF THE LEON COUNTY ATTORNEY'S OFFICE

Legal Advisor

Leon County's Source for Legal Information

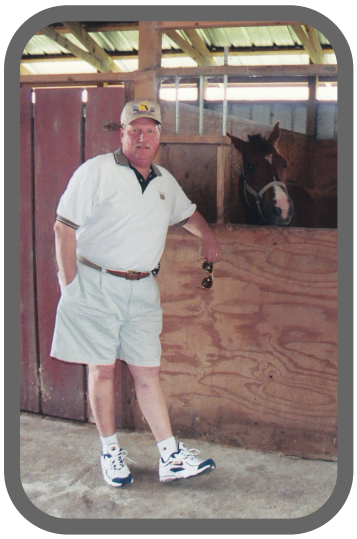
Issue 07 Spring/Summer Edition

This issue:

Celebrating 25 Years With Leon County!!! Happy Anniversary, Herb!

Prom anyone?

Leon County Attorney, Herbert W.A. Thiele, has been serving as in-house counsel for Leon County since 1990.



"Guess what I'm about to do?"

There's a new Sheriff in town!

"I take softball very seriously!"

Employee Spotlight

Jessica Marlowe Icerman joined the Leon County Attorney's Office as an Assistant County Attorney in March 2015. Jessica specializes in environmental and land use law, and Jessica holds a B.A. in Environmental Science from the University of Florida. Jessica also graduated from FSU College of Law, where she earned her J.D. and the Environmental and Land Use Law Certificate. Prior to joining the County Attorney's Office she practiced insurance defense law. Please join us in welcoming Jessica to the Leon County family!

Evangeline Tsonos is our newest Legal Assistant. Eve has been working in the legal field since 1987. She hails from New York and has worked in law firms in New York and New Jersey. Eve recently relocated to Tallahassee from northern New Jersey after marrying her high school sweetheart. Please join us in welcoming Eve to the Leon County family!

Social Media, Free Speech and the Workplace

By: LaShawn Riggans, Assistant County Attorney

There has been a marked increase in the growth of social media over the past few years. Businesses, organizations, governmental entities, and individuals are finding that the use of social media is an effective way to market, promote, and communicate. What is social media? Well, social media is a form of electronic communication (e.g., websites for social networking, blogs and microblogging) through which users create online communities to share information, ideas, personal messages, pictures, videos and other content.

With the dramatic and ever increasing use of social media employers face a plethora of issues surrounding their employees use of social media and thus face several potential conflicts and liability. This is especially true when employers take adverse employment actions against employees for information the employee has shared or posted via a social media platform.

The Supreme Court generally addressed First Amendment protections for public employee speech in *Pickering v. Bd. of Ed. of Tp. High Sch. Dist. 205, Will County, Illinois, 391 U.S. 563 (1968)*. There, the Court focused on the **subject** of the speech and the balancing of interests between those of the employee in commenting on an issue and the public employer in preventing statements harmful to the operation of the school. The *Pickering* Court held that

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"statements by public officials on matters of public concern must be accorded First Amendment protection despite the fact that statements are directed at their nominal superiors."

In 2006, the Supreme Court more fully established the current standard used to determine the First Amendment speech protections afforded to public employees, known commonly as the *Pickering-Garcetti* test, in its decision in *Garcetti v. Ceballos*, 547 U.S. 410 (2006). There, the Supreme Court held that "when public employees make statements pursuant to their official duties they are not speaking as citizens for First Amendment purposes" and their statements are not insulated from employer discipline. The *Garcetti* Court also makes it clear that, "public employees do not surrender all their First Amendment rights by reason of their employment; rather, the First Amendment protects a public employee's right, in certain circumstances, to speak as a citizen addressing matters of public concern." The *Pickering-Garcetti* test emphasizes the importance of the **relationship** between the speaker's expression and employment in determining whether such speech will be protected.

While the First Amendment invests public employees with certain rights, it does not empower them to constitutionalize the employee grievance. Without a significant degree of control over its employees' words and actions, a government employer would have little chance to provide public services efficiently. "In determining a public employee's rights of free speech, the task of the Supreme Court is to arrive at a balance between interests of the employee as a citizen, in commenting upon matters of public concern and the interest of the state, as an employer, in promoting the efficiency of the public services it performs through its employees." *Connick v. Myers*, 461 U.S. 138 (1983). Thus, a government entity has broader discretion to restrict speech when it acts in its employer role, but the restrictions it imposes must be directed at speech that has some potential to affect its operations. On the other hand, a citizen who works for the government is nonetheless still a citizen. "The First Amendment limits a public employer's ability to leverage the employment relationship to restrict, incidentally or intentionally, the liberties employees enjoy in their capacities as private citizens. So long as employees are speaking as citizens about matters of public concern, they must face only those speech restrictions that are necessary for their employers to operate efficiently and effectively." See, e.g., *Id.*, at 147, *Garcetti,* at 410-11.

Although it is the policy of the County that what a person does on his or her own time is exclusive of employment with the County a person can be held accountable for what he or she does while not at work. If an employee's conduct outside of work has the potential to damage the reputation of the County or causes others to not want to work with the employee, that employee may be subjected to disciplinary action. See, Leon County Board of County Commissioners HR Policies and Procedures, Section 10.06 County Standards. Additionally, willfully making false statements about the County or its employees is grounds for termination on the first offense. See, HR Policies and Procedures, Section 10.05, D. 3.

In conclusion, with the growing use of social

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media platforms such as Facebook and Twitter employees have found themselves in lets say, #Introubleatwork and #unemployed for posting or communicating information that is not protected speech. As the courts have stated, a person does not have constitutional protection if they turn their social media platform into a dumping ground for disparaging their employer and/or co-workers. It is especially important not to share or post information on your personal sites in a manner in which the viewer could reasonably believe you were doing so as an agent or employee of the County and not in your capacity as a citizen. It is always better to err on the side of caution. Think twice before you logon to FaceBook or Twitter to vent about something that happened at work, to gossip about another County employee, to make disparaging remarks about your supervisor, or before posting a picture or video of yourself that could potentially impact the County's reputation. If you do not, you may find yourself facing disciplinary action all the while thinking, #ButIWasntAtWork, and #Ishouldnothavepostedthat.

Surprise Ending To 2015 Legislative Session

By: Jessica Icerman, Assistant County Attorney

On April 28, 2015, the Florida House of Representatives unexpectedly adjourned three days early. The abrupt ending came after the House and Senate were deadlocked for weeks over whether to

expand Medicaid coverage. The Senate was insistent on expanding Medicaid coverage while the House and Governor Scott were opposed to the expansion.

The Affordable Care Act (ACA) planned a Medicaid expansion that would allow an estimated 800,000 Floridians access to Medicaid with the help of additional federal funding. A recent U.S. Supreme Court case, *National Federation of Independent Business v. Sebelius*, 132 S. Ct. 2566 (2012), held that the Constitution prohibits the federal government from penalizing states that choose not to participate in the Medicaid expansion program by taking away existing funding. Therefore, Florida cannot be coerced to participate in the ACA Medicaid expansion.

Florida is currently participating in the Low Income Pool (LIP) program. The LIP program pools federal, state and local dollars for distribution to healthcare providers in an effort to increase access to care. The funds help the healthcare providers subsidize the cost of providing healthcare to the uninsured and

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underinsured. Currently, Tallahassee Memorial Healthcare receives $1.5 million in LIP funds to help pay for medical resident training and a transition center, inclusive of the County's matching funds of $200,000. Additionally, the Bond Community Health Center receives more than $2.1million in LIP funds, inclusive of the County's matching funds of over $500,000. Overall, Florida receives over $1 billion dollars in federal funding through the LIP program. The LIP program, however, was slated to expire on June 30, 2015. The ACA Medicaid expansion made the LIP program unnecessary and the federal government began to phase out the LIP program. Last year, the federal government warned Florida that the LIP program would not continue in its current form after June 30, 2015. On April 14, 2015, the Centers for Medicare and Medicaid Services (CMS) sent a letter to Florida stating federal funding of the LIP program was tied to Florida's Medicaid expansion.

Feeling forced to expand Medicaid in order to receive federal LIP funding, Governor Scott filed suit against the federal government requesting declaratory and injunctive relief. The Complaint alleges the federal government is violating the Constitution by withholding federal funding unless Florida agrees to expand Medicaid. As discussed above, the U.S. Supreme Court held the Constitution prohibits the federal government from penalizing states that choose not to participate in a federal program by taking away existing funding.

After the lawsuit was filed, CMS released a statement stating the decision to expand Medicaid is a state decision and CMS would work with Florida to develop a program to support access to healthcare, regardless of whether or not Florida expands Medicaid. Per CMS, the LIP program was a temporary program previously set to expire on June 30, 2015.

Medicaid expansion and the LIP program are both designed to provide the poor with access to healthcare. The Complaint filed by Governor Scott argues that the Medicaid

expansion would not cover the same amount of Floridians covered by the LIP program. CMS, in turn, states that the LIP program funding should not be used to pay for costs that would be covered by a Medicaid expansion.

In response to the lawsuit, the U.S. Department of Health and Human Services filed documents detailing talks with Governor Scott in an attempt to demonstrate that the continuation of the LIP program was in no way connected to whether Florida pursued Medicaid expansion. On May 21, 2015, the

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Obama Administration stated in a letter that Florida would continue to receive LIP program funding, but at a lower amount than previously received, and that the funding would decrease in 2016. The letter also stressed that voluntary Medicaid expansion was Florida's best option for its poor residents and for hospital funding.

Ultimately, the Senate and House reconvened for a special session and passed a budget. Approximately $400 million in state funds are being used to cover the decrease in LIP funding. Governor Scott dismissed his lawsuit but claimed that the threat of a lawsuit lead the federal government to expand the LIP program. The issue of Medicaid expansion was essentially kicked down the road to 2016.

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